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No. 87-2118

In the Supreme Court of the United States

OCTOBER TERM, 1988

ALEXANDER M. ROJAS, ET AL., APPELLANTS

v.

VICTORIA INDEPENDENT SCHOOL DISTRICT, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether a school board policy granting the president of the school board the discretionary power to require the approval of two board members to place an item on the agenda for board meetings, where the previous policy enabled each board member himself to place an item on the agenda, is a "standard, practice, or procedure with respect to voting" under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c.

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This submission responds to the Court's invitation to the Solicitor General to file a brief expressing the views of the United States.

STATEMENT

1. The Victoria Independent School District (School District), located in Victoria, Texas, is governed by the seven-member Board of Trustees (School Board). Since 1984, voters have elected five board members from single-member districts and two members from the entire School District at-large (Original Complaint 6, *Rojas* v. *Victoria Independent School District,* No. V-87-16 (S.D. Tex.)).[1]

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[1] The Voting Rights Act of 1965 was extended to the State of Texas in 1975, covering changes in election procedures from those in effect on November 1, 1972. See 40 Fed. Reg. 43,746 (1975). Section 5 of the Act, 42 U.S.C. 1973c, bars covered jurisdictions from implementing any "voting qualification or prerequisite to voting, or standard, prac-

In April 1985, appellant Theresa Gutierrez was elected from a single-member district with a 51.4% Hispanic population and a 14% black population. She became the first and only Mexican-American ever elected to the School Board. J.S. App. 2a-3a; Stip. of Facts 2, *Rojas* v. *Victoria Independent School District*, No. V-87-16 (S.D. Tex.).

2. The School Board may transact business that is "binding on the [School] District only when it is in session with a quorum present and minutes are kept" (Stip. of Facts, *supra*, Exh. 10). A majority of the members of the School Board constitutes a quorum (Stip. of Facts, *supra*, Exh. 5, at 2, Exh. 6, at 3); the School Board's actions are taken by majority vote (Tex. Educ. Code Ann. § 17.08(d) (Vernon 1972)).[2] The School Board conducts its meetings according to the parliamentary procedures contained in H. Robert, *Robert's Rules of Order, Newly Revised* (1981) (Stip. of Facts, *supra*, Exh. 8, at 2). In order to present a matter for debate, a board member, having the floor, must make a formal motion and obtain a second from the floor. See *Robert's Rules of Order, supra*, at 326-327.

Under state law, the School Board must publish an agenda before convening any official meeting. See Texas Open Meetings Act, Tex. Rev. Civ. Stat. Ann. art. 6252-17, § 3(A)(a) (Vernon Supp. 1988) (*reprinted at* J.S. App. 13a). Although board members may discuss non-agenda matters, they may not take any action on such

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tice, or procedure with respect to voting" different from that in force or effect on the date the jurisdiction became covered under the Voting Rights Act, without first obtaining preclearance from the United States District Court for the District of Columbia or the Attorney General of the United States.

[2] "Board members have no authority except when functioning as a member of the [School] Board in an official meeting" (Stip. of Facts, *supra*, Exh. 9).

matters beyond placing them on an agenda for a future meeting (*ibid.*). According to School District policy, any other action taken on a matter not on the agenda is voidable. Stip. of Facts, *supra*, Exh. 5, at 2, Exh. 6, at 2.[3]

3. Since at least 1979, the School District has had a policy governing the preparation of agendas for School Board meetings.[4] In that year, the School District adopted an agenda policy that the "Superintendent must be notified of all agenda items" and that the agenda would be closed eight days before a regular meeting (Stip. of Facts, *supra*, Exh. 3). That general policy did not clarify whether board members alone could place items on the agenda or whether members of the general public also had this privilege. In 1983, the School District changed its policy to make clear that only board members could place items on the agenda, that such requests must be in writing, and that they must be submitted at least four days before a board meeting (Stip. of Facts, *supra*, Exh. 4).

In October 1986, a new agenda policy was proposed to the School Board. That policy would require the request of two board members in order to place an item on the agenda (Stip. of Facts, *supra*, Exh. 7, at 1). On November 20, 1986, the School Board adopted a modified version of the proposed policy. The new policy provides that

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[3] School Board policy also provides for two periods of public comment at the Board's regular meetings, one at the beginning for the discussion of items on the agenda, and another after "adjournment of the regular business meeting * * * for issues of citizen interest not on the agenda" (Addendum to Joint Stip. of Facts Exh. 15, at 1, *Rojas* v. *Victoria Independent School District*, No. V-87-16 (S.D. Tex.)).

[4] The record does not show the School District's policy or practice on November 1, 1972, the Section 5 coverage date for Texas. See note 1, *supra*. Apparently, the parties litigated this action on the assumption that the challenged agenda policy differed from that in effect on November 1, 1972.

"[r]equests for agenda items may be made by any Board member," and that "[d]epending on the nature of the items submitted, the President may require the approval of two Board members to secure placement of that item on the agenda" (Stip. of Facts, *supra*, Exh. 8, at 1).[5]

On February 27, 1987, the United States Department of Justice, by letter, requested the School District to submit to the Department, under Section 5 of the Voting Rights Act, its policy change requiring the request of two board members to place an item on the agenda. The Department stated that "this change in policy would seem to have a significant impact on the nature and character of the representation that voters can expect from their individually elected representative[s] under the newly effective single-member district plan" (J.S. App. 14a). On March 10, 1987, the School District responded to the Department's request. The School District explained that the Department had received erroneous information concerning the policy actually adopted, and attached a copy of the policy adopted on November 20, 1986, which gave the board president the discretion to require the approval of two board members to place an item on the agenda (Stip. of Facts, *supra*, Exh. 14). There was no further correspondence between the Department and the School District over the matter.[6]

[5] The president of the School Board is a board member selected by the members at the first meeting after each election. See Tex. Educ. Code Ann. § 23.19(d)(1) (Vernon 1987).

[6] The Department's letter is not an official determination that Section 5 of the Voting Rights Act applies to the matter at issue. It is the Department's practice, when informed of a matter that might require Section 5 review, to request a submission of additional information that would clarify the question of coverage under the Voting Rights Act.

In this case, the Department sent the School Board the February 27, 1987, letter largely out of concern over the timing of the November 20,

4. On March 23, 1987, appellants, Mexican-American residents and registered voters of the School District, including School Board member Theresa Gutierrez, filed this action against the School District and the School Board in the United States District Court for the Southern District of Texas.[7] The complaint alleged, among other claims,[8] that the adoption of the November 20, 1986, agenda preparation policy was a voting change requiring preclearance under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, and that appellees' implementation of that new policy without preclearance violated the Act. Appellants contended that adoption of the new agenda policy was a change "with respect to voting" under Section 5 because that policy diminished the power of board members other than the president and therefore reduced the effectiveness of the representation available to constituents of the remaining board members elected from single-member districts. See Appellants' D. C. Br. 15-19.

1986, agenda policy change. Just six days earlier, on November 14, 1986, the Department had prevailed in a Section 5 enforcement action against the School District. That action challenged a numbered post requirement that the District had implemented in 1985 for the two at-large positions on the School Board. See *United States* v. *Victoria Independent School District*, No. V-86-17 (S.D. Tex. Nov. 14, 1986). Appellees have sought no further review of that decision.

[7] Other named defendants included the School District Superintendent, the Victoria County Clerk, and the individual members of the School Board.

[8] The complaint also alleged that the School District's use of certain language in the ballot instructions for a special election for the at-large seats on the School Board "effectuates an anti-single shot voting requirement" that had not been precleared. Original Complaint 8, *Rojas* v. *Victoria Independent School District*, No. V-87-16 (S.D. Tex.). The district court severed this portion of the lawsuit and joined it with the earlier action filed by the United States against the School District. See note 6, *supra*.

More specifically, appellants argued that the agenda policy change had diluted the representation available to the Mexican-American voters of the only district that had elected a Mexican-American to the School Board. See Original Complaint, *supra,* at 10; Appellants' D. C. Br. 16.[9]

5. The three-judge district court unanimously held that the challenged agenda policy was not a "change affecting voting" under Section 5 of the Voting Rights Act (J.S. App. 8a-9a). It observed that the policy "clearly lies beyond the actual election process itself and beyond those actions listed [in the Department of Justice regulation, 28 C.F.R. 51.13]" (J.S. App. 3a).[10] The court found that "the only powers exercised by the [School Board] are exercised as a body" (*id.* at 4a). Recognizing that rules of parliamen-

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[9] Appellants also contended that the agenda policy change has "the potential for discrimination" because the School Board President could require two votes whenever appellant Gutierrez, the only Mexican-American board member, sought to place an item on the agenda that had special significance to the Mexican-American community. Appellants' D. C. Br. 30; see *id.* at 19-31. Finally, appellants emphasized that during the time period surrounding the adoption of the new agenda policy, Gutierrez and the Mexican-American community in the School District repeatedly opposed the policies and proposals advocated by the majority of the School Board members. See, *e.g.*, Appellants' D. C. Reply Br. 2-8. Appellants thus suggested that the School Board changed its agenda policy in order to restrict Gutierrez's ability to represent her constituents.

Appellants also filed a motion to convene a three-judge court under 42 U.S.C. 1973c. On June 2, 1987, the district court denied appellees' motion to dismiss under Fed. R. Civ. P. 12(b)(6), and granted appellants' motion to convene a three-judge court. Order, *Rojas* v. *Victoria Independent School District*, No. V-87-16 (June 2, 1987).

[10] Part 51 of Title 28 of the Code of Federal Regulations, chapter 1, sets forth the procedures governing the administration of Section 5 of the Voting Rights Act of 1965. Section 51.13 is a non-exclusive list of examples of changes affecting voting.

tary procedure require "a second to bring any matter before [the] body for discussion," the court reasoned that the policy does no more than "advance the time at which a second becomes requisite to drawing a matter before the board" (*id.* at 5a). The court therefore concluded that the effect of the policy on the actual power of elected board members was "at most min[u]scule" (*id.* at 4a). Finally, the court determined that the policy does not single out appellant Gutierrez for unfavorable treatment, and that the School Board has never applied the policy to her disadvantage (*id.* at 6a).[11]

DISCUSSION

The decision of the district court, holding that the November 20, 1986, agenda preparation policy is not a change affecting voting under Section 5 of the Voting Rights Act, is correct. The decision does not involve a substantial question under the Voting Rights Act and does not conflict with any decision of this Court or any other federal court. Plenary review is therefore unwarranted and the decision should be summarily affirmed.

1. Congress enacted Section 5 of the Voting Rights Act as " 'a response to a common practice in some jurisdictions of staying one step ahead of the federal courts by passing new discriminatory voting laws as soon as the old ones had been struck down.' " *Beer* v. *United States,* 425 U.S. 130, 140 (1976) (quoting H.R. Rep. No. 196, 94th Cong., 1st Sess. 57 (1975)). Under Section 5, jurisdictions subject to the Act must therefore obtain "preclearance" from either the United States District

[11] As the court stated, "[i]t seems plain to us that if Mrs. Gutierrez is unable to persuade even one other trustee to join her in placing a matter on the board's agenda, she would have had no better success in procuring a second should she have moved it at a meeting—let alone in collecting the four votes required to pass it" (J.S. App. 5a-6a).

Court for the District of Columbia or the Attorney General of the United States, for "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" different from that in force or effect on the date the jurisdiction became covered under the Act. 42 U.S.C. 1973c; see note 1, *supra*.

Congress intended Section 5 to be applied broadly. The Act itself defines the terms "vote" and "voting" to include "all action necessary to make a vote effective in any primary, special, or general election." 42 U.S.C. 1973*l*(c)(1). Moreover, the scope of Section 5 is not limited to changes directly affecting the casting of a ballot. The Court has recognized that "[t]he right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot." *Allen* v. *State Bd. of Elections,* 393 U.S. 544, 569 (1969) (change from district to at-large voting for county supervisors covered by Section 5); see *Georgia* v. *United States*, 411 U.S. 526, 534 (1973) (reapportionment covered by Section 5). Thus, Section 5 covers changes that affect "the power of a citizen's vote" (*Allen*, 393 U.S. at 569), as well as those that "undermine the effectiveness of voters" (*id.* at 570).

2. The Voting Rights Act protects voters, not elected officials. Nonetheless, there are circumstances in which a change in the powers of elected officials may reduce (or eliminate) the ability of minority voters to elect those officials with decisionmaking authority. Consider, for example, a seven-member legislative body that has four members elected from single-member districts and three members elected at-large, which then decides to delegate to a committee comprised of the three members elected at-large the power to decide all fiscal matters, a power that a majority of the body previously exercised. In such a case, the change—limiting the power of the members elected from single-member districts over fiscal matters—would

affect the ability of the constituents in those districts to elect members who decide fiscal matters. That change would certainly limit the power and effectiveness of voters in the single-member districts and thus would be covered by Section 5.

Indeed, this Court recognized in *Lockhart* v. *United States,* 460 U.S. 125 (1983), that a reallocation of elected officials' power can be a change within the scope of Section 5. In *Lockhart*, the city had changed its governmental structure from a mayor and two commissioners to a mayor and four council members. Although the city conceded that the addition of two seats was a change subject to Section 5, it argued that Section 5 did not apply to the "continuation" of the two old seats (460 U.S. at 131). The Court rejected this argument, stating that, "[i]n moving from a three-member commission to a five-member council, [the city] has changed the nature of the seats at issue" (*ibid.*). The Court noted that, as a result of the new governmental structure, the two "old" seats "constitute only 40% of the council, rather than 67% of the commission" (*ibid.*). Thus, the transfer of power from a three-member body to a five-member body had the potential for undermining the effectiveness of constituents' votes (*id.* at 131-132).[12]

[12] In exercising its administrative responsibilities under Section 5, the Department of Justice has under certain circumstances treated changes in elected officials' power as covered: (1) Mobile, Alabama (March 2, 1976), involving assignment of specific administrative functions to each commissioner; (2) LaPorte, Texas (December 27, 1979), involving an increase in the number of council positions from five to seven and changing the role of the council members from legislative/administrative to purely legislative; (3) City of Brunswick and Glynn County, Georgia (August 16, 1982), involving a consolidation of the city and county governments and the respective boards of commissioners; and (4) Waycross, Georgia (February 6, 1988), involving changes in the power and duties of the mayor. See also Brief for the United States 15-16, *Lockhart* v. *United States*, 460 U.S. 125

3. Against this background, we disagree with the district court's suggestion that Section 5 can never reach an "[o]rdinary, routine legislative modification of the duties or authority of elected officials" (J.S. App. 3a). Depending on the court's definition of "ordinary" and "routine," such changes may in fact negate the effectiveness of the vote, and may therefore fall within the scope of Section 5. At the same time, however, not every change in the powers of elected officials is a change affecting voting. Here, the district court correctly held that Section 5 did not cover the change at issue because the November 20, 1986, agenda preparation policy does not shift any decisionmaking power, and thus cannot affect a voter's ability to elect board members who exercise such power.

The November 20, 1986, agenda preparation policy gives the School Board President the power to require, at

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(1983) (No. 81-802) (contending that the city's adoption of a home rule charter and the resulting restructuring of the city's government was "a redistribution of powers among officials elected by different constituencies" and thus covered by Section 5); Brief for the United States as Amicus Curiae Urging Reversal 21-27, *McCain* v. *Lybrand,* 465 U.S. 236 (1984) (No. 82-282) (arguing that the transfer of power to county government officials by the implementation of home rule was subject to Section 5).

Moreover, the Department has considered adding to the list of voting changes contained in 28 C.F.R. 51.13 an example that would reflect the decisions in *McCain* v. *Lybrand, supra, Hardy* v. *Wallace,* 603 F. Supp. 174 (N.D. Ala. 1985) (three-judge court), discussed *infra,* and *Horry County* v. *United States,* 449 F. Supp. 990 (D.D.C. 1978) (three-judge court), discussed *infra,* concerning the reallocation of governmental power. The Department declined to do so, stating, "[w]hile we agree that some reallocations of authority are covered by Section 5 (e.g., implementation of 'home rule'), we do not believe that a sufficiently clear principle has yet emerged distinguishing covered from noncovered reallocations to enable us to expand our list of illustrative examples in a helpful way." 52 Fed. Reg. 488 (1987).

his discretion, the request of two board members to place an item on the agenda. That policy, of course, does not affect any powers of the School Board as a whole. The policy also does not affect the power of an individual board member to influence the outcome of School Board decisions, since those decisions continue to require a majority vote. Nor does the policy change the fact that school board members do not have any decisionmaking power in their individual capacities.

Indeed, the agenda preparation policy does not even affect a board member's ability to have matters of interest to his constituents discussed at board meetings. Although the policy may, when implemented, prohibit a member from placing a particular item on the agenda (when that member cannot obtain a second request for the agenda item), merely placing an item on the agenda is not a sufficient condition for full discussion or board action, and thus does not ensure that either will occur. Under applicable parliamentary procedure, the sponsoring member must obtain a second either to initiate discussion or to propose a resolution for a vote.[13] Thus, as the district court concluded, "at most, the effect of the challenged change is to advance the time at which a second becomes requisite to drawing a matter before the board" (J.S. App. 5a).

Furthermore, board members may address, in a limited fashion, matters not on the agenda, and may take steps to place such matters on the agenda for the next meeting. Thus, an individual member can create a public record of the School Board's refusal to place an item on the agenda by requesting at a meeting that the item be placed on the agenda for the next meeting. See also Appellees' Mot. to Dis. or Aff. App. 7a-9a. In sum, the agenda preparation policy's restriction on an individual board member's

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[13] See *Robert's Rules of Order* 26-34.

power, which does not undermine the effectiveness of his constituents' votes, does not fall within the scope of Section 5.

4. Contrary to appellants' suggestion (J.S. 16), the district court's decision does not conflict with *Hardy* v. *Wallace,* 603 F. Supp. 174 (N.D. Ala. 1985) (three-judge court), and *Horry County* v. *United States,* 449 F. Supp. 990 (D.D.C. 1978) (three-judge court). In *Hardy*, the court concluded that a state statute providing for the governor to appoint members of a county racing commission, where formerly the county's state legislative delegation appointed those members, was a change within the meaning of Section 5 because of "its effect on the power of the voters." 603 F. Supp. at 178. The court stated that "the transfer of appointment authority to the governor, over 99.7% of whose constituents are not inhabitants of Greene County, substantially dilutes the power of the voters in Greene County by effectively eliminating the power of such voters over the Commission." *Id.* at 179. In other words, the transfer of power in *Hardy* did affect the ability of the voters in Greene County to elect persons with decisionmaking authority.

Similarly, in *Horry County* the court held that a state statute providing for the direct election of a county board of commissioners, where the governor previously appointed commissioners upon the recommendation of the county legislative delegation, and giving that board additional legislative authority, was also a change subject to Section 5. The court stated that the statute could dilute voting rights, and would "reallocate[] governmental powers among elected officials voted upon by different constituencies." 449 F. Supp. at 995. If minority voters had more influence on the choice of governor or the legislative delegation, the change to direct elections could

diminish the effectiveness of those votes; as a result, minority voters would have less influence in the selection of the county commissioners. See *id.* at 995-996.

Thus, both *Hardy* and *Horry County* involved changes in the allocation of power among elected officials which, in turn, affected certain voters' ability to elect officials with decisionmaking power. In this case, however, the November 20, 1986, agenda preparation policy has no effect on the power of individual board members or the School Board itself to transact official business. The policy, therefore, does not undermine the effectiveness of any individual's vote and consequently falls outside the scope of Section 5 of the Voting Rights Act.[14]

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[14] There is no merit to appellants' contention (J.S. 20-21) that the district court improperly based its decision on a determination that the new policy was in fact not discriminatory. To be sure, the court noted that appellants might be able to mount a constitutional challenge if the policy were applied in a discriminatory manner (J.S. App. 6a & n.5 (citing *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886)). That observation, however, simply cannot be construed as a ruling that the change affects voting but falls outside the scope of Section 5 because it is not discriminatory. Indeed, as the district court emphasized, appellants conceded "that in fact [the policy] has yet to be applied to *any* measure" (J.S. App. 6a n.5 (emphasis in original)).

We recognize that an allegation that appellees purposefully adopted the new agenda policy in order to limit the ability of the only Mexican-American board member to raise matters at School Board meetings could give rise to a cause of action on behalf of that board member under the Fourteenth Amendment and 42 U.S.C. 1983. But as explained above, such an action would not constitute a change affecting voting under Section 5 of the Voting Rights Act.

CONCLUSION

The judgment of the district court should be affirmed.
Respectfully submitted.

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